

UNITED STATES PLAYING CARD } APPELLANTS;
COMPANY (PLAINTIFFS)..... }

1918
*Dec. 2.

AND

A. O. HURST (DEFENDANT)..... RESPONDENT.

1919
*Feb. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE
SUPREME COURT OF ONTARIO.

*Trade mark — Playing cards — “Bicycle” design — Infringement —
Passing off—Intent—Damages.*

The word “Bicycle,” as the name given to a certain class of playing cards, may become a valid trade-mark.

The sale by other manufacturers of cards described as “Bicycle Series” with the word “Bicycle” occupying a line in letters larger than “Series” is an infringement of the right in the trade mark. Idington J. dissenting.

The finding of the trial judge that a foreign manufacturer and its agent in Canada conspired to defraud the owner of its trade name, and the profits to be derived therefrom, should not be interfered with on appeal. Idington J. dissenting on the ground that the evidence did not justify such finding.

In an action asking for an injunction to restrain the defendant from passing off its cards for those of the plaintiff

Held, that though there is no evidence of actual passing off by the defendant the injunction should be granted if the defendant has offered for sale cards which could be passed off for those of the plaintiff, and there is sufficient evidence of an intention to do so.

The plaintiff’s relief in such case would be a judgment for nominal damages with an inquiry at its own risk if it claimed to be entitled to substantial damages. *A. G. Spalding Bros. v. A. G. Gamage Co.* (113 L.T. 198) fol.

Judgment of the Appellate Division (39 Ont. L.R. 249); 34 D.L.R. 745), reversed in part and that of the trial judge (37 Ont. L.R. 85; 31 D.L.R. 596) restored in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), varying the judgment at the trial (2), in favour of the plaintiff.

The material facts are sufficiently indicated in the above head-note.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 39 Ont. L.R. 249; 34
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(2) 37 Ont. L.R. 85; 31
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The Chief
 Justice.

D. L. McCarthy K.C. and *Britton Osler* for the appellant.

Moss K.C. and *Heighington* for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—In regard to the claim herein made, and so far as founded upon mere passing off, the appellant obtains by the judgment in question herein all it is entitled to on the evidence presented for our consideration, and, I incline to think, a little more.

There is not, in my view of the evidence, enough therein to maintain a case merely of passing off, as defined and applied in such recent cases as *A. G. Spalding Bros. v. A. W. Gamage* (1); *Horlick's Malted Milk Co. v. Summerskill* (2); *Universal Winding Co. v. George Hathersley & Sons* (3); *Singer Mfg. Co. v. Loog* (4); *Standard Ideal Co. v. Standard Sanitary Manufacturing Co.* (5), at page 86.

I am unable to agree with the learned trial judge that there was evidence of a conspiracy such as he finds between respondent and his employers. Indeed, the use, by the Goodall Company, as evidenced by their catalogue, 1898-1899, of the pictorial representation of a bicycle design on one of their cards, five years before the respondent entered their employment, seems destructive of the basis of such finding and none the less when we are assured by appellant's counsel that the production of that catalogue is the result of industrious search on the part of appellant.

There is indeed evidence of a somewhat earlier use by Goodall & Co. of the pictorial design of a bicycle.

(1) 113 L.T. 198.

(2) 61 S.J. 1148; 33
 Cut. P.C. 108.

(3) 32 Cut. P.C. 479.

(4) 8 App. Cas. 15 at p. 18.

(5) [1911] A.C. 78.

Like much else in this case the inquiry suggested by these facts does not seem to have been prosecuted. It may be, as suggested by counsel for respondent, his misfortune arising from war conditions rather than his fault. Be that as it may we are limited to what is before us.

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Again I am unable to accept the theory put forward in argument that by reason of the mere word "bicycle" having been appropriated as a trade mark by appellant, the respondent was debarred thereby from the use of any design into which entered the pictorial representation of a bicycle or any part thereof, or of either coupled with a rider thereon, or anything else to attract the eye.

It is the right of every one of His Majesty's subjects to decorate his goods with any symbol he pleases, so long as that symbol has not become, by use or by virtue of registration, the individual property of another. It is equally his right to use language descriptive thereof so long as deception is not intended or likely to arise therefrom.

Yet it is mainly by disregard of these rights that the case for appellant has been built up; and largely by a confusing mass of evidence, much of it by leading witnesses who evidently had no correct appreciation of the matters they were talking about. In many parts of their evidence they confuse the design on the card with the trade mark which they seek to establish.

Nevertheless if we could properly find as a fundamental fact that there was a conspiracy of the kind claimed to have existed, then, even such unsatisfactory evidence might be made more or less properly serviceable to prove the actual execution of the purpose of such a conspiracy.

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I admit that from circumstances attendant upon the execution, or even attempted execution, of an unlawful purpose, we may occasionally be able to infer the existence of a conspiracy.

But here I can find nothing sufficiently substantial in the respondent's acts and the circumstances relied upon to demonstrate either the existence of such a conspiracy or a course of conduct which can only be attributable to the purpose of illegally depriving appellant by means of deception of that property it had in the goodwill or prosperity of its business, or whatever the legal right in question may be.

Nor can I find in the evidence that degree of probability of injury having been, or at the institution of this action, being, suffered by the appellant, from anything done by the respondent, which is necessary in order to maintain the action for a passing off, when there is not a vestige of direct evidence on the point.

There would not, in my opinion, have been the slightest chance of any wholesale dealer, or retailer buying from him, being deceived by reason of all that which is put forward in this case, and alleged to be a means of deception, into buying the Goodall cards instead of the appellants'.

And those buying from the retail dealer cards for use are not of the stupid variety of mankind whose eyes, when cast upon a card, are likely to be readily misled.

In so far, therefore, as this case rests upon a passing off, as claimed, I think it should have been dismissed.

In regard to the claim by appellant for an infringement of its trade marks, which are but an artificial means, as it were, for the protection of the rights which are liable to be invaded by a passing off, the exact nature in law of what such a trade mark is must be

correctly appreciated before we proceed to consider the proof of infringement.

It may be still held in a passing-off action (as I have assumed for that part of this case) to have a meaning and effective force independently of that assigned it in our "Trade Mark and Design Act" but in light of section 20 thereof, which reads as follows:—

"20. No person shall institute any proceeding to prevent the infringement of any trade mark, unless such trade mark is registered in pursuance of this Act,

I think all the appellant can complain of herein, resting alone upon its claims for infringement of its trade marks, must fall within the meaning of Part I. of said Act.

In expressing my assumption that for the purposes of this case I have considered the trade mark as if possibly an effective force, had there been anything coupled therewith to make out a case of passing off, I must not be taken as having formed a decided opinion. The imperative language of prohibition in the section just quoted may, in a passing-off case, some day be argued as depriving a plaintiff, or as enough to deprive him, of any support to be derived from a trade mark, unless it had been registered in course of what is alleged in the case.

On the principle that a man cannot do indirectly what he is forbidden to do directly, why should he get the benefit of an unregistered trade mark?

Section 4 defines and differentiates "general" from "specific" trade marks.

All those in question herein are of the latter class, which is defined as follows:—

(b) "Specific trade mark" means a trade mark used in connection with the sale of a class merchandise of a particular description.

Then follows section 5 (which has a marginal note "What shall be deemed to be a trade mark") and reads as follows:—

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5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

Section 19 of the Act reads as follows:—

19. An action or suit may be maintained by any proprietor of a trade-mark against any person who uses the registered trade mark of such proprietor, or any fraudulent imitation thereof, or who sells any article bearing such trade mark or any imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act.

We are confined by virtue of Part 1 of the Act, and especially by these two sections, to an enforcement only of the rights which may be rested upon a correct interpretation and construction of the language therein.

The question raised herein must, therefore, be whether or not the respondent has in fact used in the manner indicated in the said section 19, any of the appellant's registered trade marks, or any "fraudulent imitations" thereof.

I observe the change in the language in the first part of the section dealing with the use of the mark, to that in the second part dealing with him who sells any article bearing such trade mark, or any imitation thereof.

I incline to hold that the meaning of the word "imitation" in any case resting upon either branch of the section must be a "fraudulent imitation."

The registration by appellant of the word "bicycle" took place on the 17th day of July, 1906, and that seems to be the most important of the four trade marks in question, if we take the attention devoted to it in the case as a measure of its relative importance.

Now it is only the use of that word itself by respondent in the like manner to that which section 5 indicated to be the measure of appellant's right, that can be complained of as an infringement.

And, by the express terms of section 5, it must be a use falling within the words,

for the purpose of distinguishing any manufacture, etc. * * * manufactured * * * applied in any manner whatever either to such manufacture, etc., * * * or to any package, parcel, case, etc., * * * of any description whatsoever containing the same,

that can be the basis of the right of action given in section 19.

I do not think these words can be stretched to cover the use of the word "bicycle" in an advertisement as alone sufficient to found an action upon.

Much less can they be held to cover any pictorial representation of a bicycle or of any part thereof.

Eliminate these two grounds of alleged offence and I find nothing in what respondent has done since the registration by appellant of the word "bicycle" which can fall within the meaning of the words in section 5 of the Act.

It is only by a confusing use of the word "bicycle" so as to make it cover any and every sentence in which that word can be found and thus extend the meaning of the trade mark beyond its limitations that the appellant can hope to succeed on this ground of complaint relative to the word "bicycle."

As to the objection taken by appellant founded upon the use of pictorial representation of a bicycle or any part thereof as an equivalent of the word, its own acts of registration furnish a complete answer by way of argument.

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Before registering "bicycle" as a word, it had registered same day a representation of a bicycle and

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a rider thereon, and followed both by another pictorial representation of a bicycle and much else.

If the single word "bicycle" should be applied to cover all sought for it to cover herein, such a proceeding must have been useless.

True these trade marks are alleged in evidence and argument to be respectively applicable to different grades of cards. Assuming that to be so and possible within the meaning of the Act I imagine there should be something on record to distinguish what is intended to be covered.

There does not seem to be anything more than an intended use in the sale of playing cards indicated in the applications for these several trade marks in question. I doubt much if that is a compliance with the Act and fulfils the purpose thereof, but in my present view I need not follow that suggestion.

As to the other trade marks in question I can find no actual imitation thereof much less a fraudulent imitation. Indeed the Goodall Company, as already indicated, in dealing with the other phase of this complicated case, had been using for seven or eight years before these registrations cards having its own pictorial designs thereon.

Before parting with this case I may say that during the argument I had a decided impression that Mr. Moss's objection that a design on the back of a card could not properly be registered as a trade mark was unfounded. Much reading of evidence herein which exhibits the mind of those engaged in the manufacture of cards, and a further consideration of the Act, led me to doubt the propriety of such registrations.

I need not say any more in view of the conclusions I have reached and expressed.

I think the appeal should be dismissed with costs here and below; the cross appeal allowed and action dismissed with costs, but as there were no costs by reason of a cross-appeal as such—as sometimes is found to exist—this should mean only one set of costs.

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ANGLIN J.—My subsequent study of this case has confirmed the impression left on my mind by the argument that the findings of the learned trial judge, most of them confirmed in the Appellate Division, cannot be disturbed. Where the Appellate Division has interfered the evidence and the reasonable inferences from it, in my opinion, so far support the trial judge's conclusions of fact that they should be restored. He held, upon facts which, if they did not compel, at least warranted, such a finding that

the proper inference from all the evidence is that Hurst and the Goodalls conspired together to defraud the plaintiff of its trade name and of the profits legitimately its, as the result of its advertising and enterprise,

I am not inclined to differ from the learned judge who saw the witnesses on the question whether the defendant was an honest man or not, and where there is a finding such as we are here confronted with I am little disposed to make nice refinements or subtle distinctions in order to cut down what has seemed to an experienced trial judge to be necessary for the protection of the holder of a trade mark. *Perry & Co. v. Hessin* (1), at pages 527-8, 532.

The only question on which I think there is room for any doubt is whether the plaintiffs did not adopt the word "bicycle" as a grade, quality or style mark rather than as a trade mark—(*U.S. Playing Card Co. v. Clark* (2)). If this question be open under our statute (R.S.C., ch. 71, secs. 5 and 13 (2) and 19), I

(1) 29 Cut. P.C. 509.

(2) 126 U.S. Patent Office Gazette 2190;
132 U.S. Patent Office Gazette 681.

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think the better conclusion is that the finding of the trial judge in favour of the trade mark, affirmed in appeal, should not upon the evidence before us be disturbed.

The amendment to the 4th paragraph of the judgment made by the Appellate Division, however, is probably quite proper. The infringement therein dealt with would seem to have been of the specific trade mark mentioned by Mr. Justice Hodgins rather than of the several trade marks set out in paragraph 5 of the judgment of the trial court. Moreover, the judgment, as varied by the Appellate Division in this respect, seems to afford full protection to the plaintiffs.

But I cannot say the same of the amendments made to paragraphs 1, 5 and 7. These would seem to open the door to use of the word "bicycle" (for instances in the phrase "Bicycle Series" as used by Goodalls, the word "Bicycle" being in large letters on one line and the word "Series" in smaller letters on the next line), quite inconsistent with the measure of protection necessary to insure to the plaintiffs the full benefit and enjoyment of their trade mark for that word. In my opinion the declaration and injunction granted by the trial judge were not too wide for that purpose (*Singer Manufacturing Co. v. Loog* (1); *Apollinaris Co. v. Norrish* (2), and should be restored.

There remain the questions as to passing off and the assessment of damages.

It is common ground that no instance of passing off has been shewn. But in the opinion of the learned trial judge intention to pass off was abundantly proved and all means necessary to facilitate passing off were provided. These circumstances, in his view, made it

(1) 8 App. Cas. 15.

(2) 33 L.T. 242.

unnecessary for the plaintiffs to shew that the opportunity thus afforded had been actually taken advantage of. In the Appellate Division it was thought on the other hand that the presence of the manufacturer's name on cards (the ace of spades), tuck cases and cartons would so probably preclude even retail customers being taken in that evidence of actual passing off was essential and that the plaintiffs should fail on this branch of the case because they had not established "a reasonable probability of deception." In this connection the evidence of Donald Bain, a leading retail stationer in Toronto, is important:

Q.—Do you remember whether any card of Goodall's during the time you were in business had any bicycle design on it or anything of that kind? A.—Latterly they brought out a card with a bicycle design, more after the design of the American card, to take its place.

Q.—Would you say when that was? A.—I would not like to say the year.

His Lordship:—About how many years ago? A.—Of course, that is about fifteen years ago.

Mr. McCarthy:—About fifteen years ago they brought out—do you know how they graded that card—what they called it? A.—I think they called it, if I remember rightly, the "Bicycle" card, too.

Q.—Then what was the result as far as the trade was concerned, with regard to using the word "Bicycle" when they brought that out? A.—There was a good many of their cards sold, if you were a smart enough clerk, you could sell them in place of the American cards.

Q.—If you were a smart enough clerk, you could sell them instead of the American card—in the trade what was meant by the "Bicycle" card after Goodall brought out his? A.—It was an infringement.

While it would, no doubt, have been more satisfactory had there been evidence by several men engaged in the business similar to that given by Mr. Bain, and, better still, if actual passing off had been proved, I incline to accept Mr. Justice Middleton's view that enough was shewn to establish a reasonable probability of deception, which would suffice to sustain his judgment. *A. G. Spalding v. Gamage* (1), at pages 199, 203; *Saxlehner v. Apollinaris Co.* (2); *Iron-Ox Remedy*

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Co. v. Co-operative Wholesale Society (1); *Liebig's Extract of Meat Co. v. The Chemists Co-operative Society* (2); *Claudius Ash Sons & Co. v. Invicta Mfg. Co.* (3), at pages 475, 476; *Albion Motor Car Co. v. Albion Carriage & Motor Body Works* (4).

As to the damages, with great respect, the fixing of them at \$250 would seem to have been purely conjectural and arbitrary. It is true that the defendant's interests were in a measure protected by the offer of a reference at his own risk as to costs—a provision of which its omission from the formal judgment indicates that he declined to avail himself. But although the proof of infringement and the establishment of a case of passing off entitle the appellants to nominal damages, and the probability that actual damages were sustained entitles them to inquiry at their own risk, that, I think, is the full measure of relief that should be accorded. *A. G. Spalding Bros. v. A. W. Gamage, Ltd.* (5), at page 199. The formal judgment of the Appellate Division directing a reference would seem to indicate that the appellants had accepted the provision made by Mr. Justice Hodgins for an inquiry, should they desire it, with a reservation of costs. The case of *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (6), cited by the learned judge, is scarcely in point, however, because, as Mr. Justice Moss points out, it there

appear(ed) from the evidence that no purchaser had been misled into buying the defendants' product instead of the plaintiff's.

Here this negative has not been established.

With the modifications indicated I would restore the judgment of the trial judge. The appellant should

(1) 24 Cut. P.C. 425, 430.

(2) 13 Cut. P.C. 635, 644.

(3) 29 Cut. P.C. 465.

(4) 33 Times. L.R., 346.

(5) 113 L.T. 198.

(6) 4 Ont. L.R. 545, 553.

have its costs of the appeal to this court and the cross-appeal should be dismissed with costs.

BRODEUR J.—This is an appeal from a judgment of the Appellate Division of Ontario varying a judgment of the Supreme Court rendered by Mr. Justice Middleton.

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The action had been brought to restrain certain alleged infringements by the respondent of the trade marks claimed by the appellant with respect to playing cards and to restrain the respondent from passing off the respondent's playing cards as cards of the plaintiff. These trade marks consisted of the word *Bicycle* applied to playing cards and in three designs called respectively, *Safety*, *Expert* and *Acorn*, on which the bicycle was a characteristic feature.

Mr. Justice Middleton held that those trade marks had been infringed upon and the injunction prayed for was maintained.

The Appellate Division confirmed the injunction as to passing off and as to the trade marks, *Safety*, *Expert* and *Acorn*. As to the trade mark "Bicycle," the Appellate Division varied the judgment by deciding that the cards bearing a design representing a bicycle were not an infringement of the patent and that the use also of the words *Bicycle Series* did not constitute an infringement; but that the defendants should be restrained from using the word bicycle on tucks and cartons and should use the words *bicycle cards* generally. The nominal damages which had been granted by Mr. Justice Middleton were set aside by the Appellate Division. The plaintiff appeals to this court from the judgment of the Appellate Division and, on the other hand, the respondent cross-appeals and, therefore, all the questions which had been raised by the pleadings are now in issue before this court.

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The evidence shews that in 1885 the appellant company was manufacturing four grades of playing cards which were known respectively as Tigers, Tourist, Army and Navy, and Congress. Those cards were of different prices, qualities and finish, two of those grades being expensive cards and two of a cheaper kind.

It was found advisable, in order to satisfy the demand in the trade for a playing card of another grade lying intermediate between the expensive and the cheap grade, to create a fifth grade. A name had to be given to that card; and, as at that time the use of the bicycle was becoming very popular, they thought of giving the name of *Bicycle* to that grade; and, as the requirements of the trade demanded, different designs of bicycles were used on the back of the cards; and in that way the *Acorn*, the *Expert* and the *Safety* were manufactured and put on the market. Some other designs of the bicycle idea were also put on the market; some were successful and were maintained, like the *Expert*, the *Safety* and the *Acorn*; some others were less successful; and in 1906 trade marks were applied for and obtained.

About the time those designs were registered as trade marks another trade mark was obtained by the appellants for the word *bicycle*. It appears that large sums of money were spent by the appellant company to advertise their cards, and particularly the bicycle card. The result was that those bicycle cards were in great demand on the Canadian market and also in the United States, where, in all probability, the appellant company were the largest manufacturers.

In Canada one or two companies manufactured some playing cards; but it does not appear by the evidence that it was done on an extensive scale. The sales of playing cards appear, on the contrary, to be

divided on the Canadian market between the appellant company and the large English firm of Charles Goodall & Co.

Hurst, the respondent, was a traveller for a wholesale stationery firm of Toronto; and, as such, was selling playing cards of the appellant company and of the Charles Goodall Company, and he was thoroughly familiar with the playing card trade in Canada. In 1901 he solicited from Charles Goodall & Co. the Canadian agency for the sale of their cards; and, having obtained that agency, he devoted himself entirely to it.

It appears that before that date the Goodall firm had in some cases also used the word "bicycle" in connection with their playing cards; but it was done in a very quiet way and the Canadian trade did not seem affected at all by it; but after Hurst became their sole Canadian agent their hesitation in that respect seemed to cease and they began to use extensively the word "bicycle" in connection with their cards, called the "Viceroys" and the "Imperial Club." Their sample books began to display in a conspicuous way the word "bicycle." It became pretty clear that the use of this word either by Goodall or by Hurst interfered with the trade of the appellant company; and the present action was instituted to restrain Hurst in connection with his playing cards.

It is contended that playing cards are not a proper subject matter of trade mark registration. There is absolutely nothing in the statute which prevents the word "bicycle" or the designs mentioned in those trade marks from being the subject of a trade mark. It cannot be claimed that the word was descriptive of the article to which it was applied. It was a fancy word which certainly could be used in connection with the

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playing cards. The respondent himself admits that the term "bicycle" used in connection with the playing card trade had a definite meaning as referring to the manufacture by the appellants.

Our statute states, (ch. 71, sec. 5), that all marks, names, labels, packages or devices which are adopted for use by any person in his trade for the purpose of distinguishing any goods manufactured by him be considered and known as trade marks. The word "bicycle" and the design in question had been in use for a great number of years by the appellant company. They were known in the trade as such and I have no doubt that they could be made the subject of a trade mark.

On that ground the trial judge and the Court of Appeal express the same view in which I concur.

If the Goodall Company had used, previous to the registration, the word "bicycle," it could not have affected the rights of the plaintiff company which had been using this description of goods for a great number of years and had established a trade by which those cards came to be known as *bicycle cards*. I am unable to agree with the Appellate Division in its variation of the decision of the trial judge. If the word "bicycle" has become known in the trade as connected with the goods of the appellant company, it seems to me that the word used in some way or other by some competitive firm would be illegal. Whether the respondent would claim the Goodall cards to be part of the Bicycle Series or whether designs would be put on the back of those cards representing a bicycle, I think that either would constitute an infringement upon the trade mark of the appellant company. Sebastian

on Trade Marks (5 ed.), p. 147; *Johnston v. Orr Ewing* (1); *Read Bros. v. Richardson & Co.* (2); *Edelsten v. Edelsten* (3).

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In those circumstances, I am of the opinion that the action of the plaintiff should be maintained, that the appeal should be allowed with costs of this court and of the court below, and that the cross-appeal should be dismissed with costs.

MIGNAULT J.—I concur in the opinion of Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants: *Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Fetherstonhaugh & Co.*

(1) 7 App. Cas. 219.

(2) 45 L.T. 54.

(3) 1 De G. J. & S. 185.